SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VOLANTE,

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

Index No. E2022-0116CV

McAllister, J.S.C.

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Executive Respondents' Memorandum of Law in Opposition to Motion to Intervene by Larry Sharpe, Diane Sare, Cody Anderson and Mark Braiman (Motion # 14 via NYSCEF)

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PRELIMINARY STATEMENT

Respondent Kathy Hochul, Governor of the State of New York[1] (the "Executive Respondent"), respectfully submits this memorandum of law opposing the pending motion to intervene by Larry Sharpe, Diane Sare, Cody Anderson, and Mark Braiman (collectively, "the proposed intervenors"). *See* NYSCEF No. 541 ("Motion #14").

To date, four other motions to intervene brought by various registered voters, candidates, and potential candidates (including independent candidates) have already been denied in this case, three recently by this Court, and one back in April by the Appellate Division, Fourth Department. *See* NYSCEF Nos. 441 & 520. One such motion denied by this Court was brought by five candidates for Congress and State Senate, who sought to "intervene to protect their rights as candidates" to appear on primary party ballots and/or as independent candidates on the general election ballot. *See* NYSCEF Nos. 327 & 339 (Motion #12). With respect to independent nominating petitions, those proposed intervenors asserted that "[i]f said petition periods are truncated, the Court should reduce the number of signatures accordingly." NYSCEF No. 331 ¶ 11. In its Decision and Order filed May 11, 2022, this Court, *inter alia*, denied intervention as untimely, and held that "the existing parties will be able to adequately represent the interests of these people going forward." NYSCEF No. 520 at p. 4-5.

In the instant motion, Sharpe alleges that he is a candidate for New York State Governor endorsed by the Libertarian Party of New York. *See* NYSCEF No. 530 ¶ 1. Sare alleges that she is a candidate for United States Senate endorsed by the LaRouche Independent Party. *See* NYSCEF No. 531 ¶ 2. Meanwhile, Anderson is the "Chair and de facto President of the Libertarian Party of New York." *See* NYSCEF No. 532 ¶ 1. Finally, Braiman alleges he is a candidate for the United States

[1] The office of the Lieutenant Governor and President of the Senate is currently vacant.

House of Representatives, 22nd District of New York, endorsed by the Libertarian Party of New York. *See* NYSCEF No. 533 ¶ 1. None of these parties is a recognized political party in New York; they are instead "independent bodies" who may only qualify to appear on the general election ballot by satisfying the requirements for these entities. *See* Election Law § 6-142 (number of signatures). And similar to their predecessors, the proposed intervenors seek "to intervene to protect their rights as voters, candidates, and potential ballot-qualified political parties qua independent bodies"; in particular, they seek (1) a 4-week extension of the petitioning period for independent nominating petitions set to expire on May 31, 2022; (2) a reduction from 45,000 to 30,000 signatures required to petition onto the ballot for non-recognized-party statewide candidates; and (3) waiver of the 500 signature requirement per each of 13 congressional districts, thus 6,500 signatures out of the 45,000 total required for statewide candidates. *See* Election Law § 6-142.[2]

Like the four prior motions to intervene, the instant motion should be denied. The proposed intervenors' concerns about timing and signature requirements for independent nominating petitions are untimely, as they were foreseeable from commencement of this proceeding challenging the congressional districts and have already been raised by the existing parties. Furthermore, intervention is inappropriate because the proposed intervenors cannot demonstrate a sufficiently "severe burden" on their First Amendment rights to overcome the State's well-recognized, substantial interest in (a) regulating access to the general election ballot by independent candidates to avoid voter confusion and declutter the ballot by ensuring only those candidates with sufficient support appear on the ballot; and (b) upholding reasonable election deadlines to preserve orderly and efficient elections.

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[2] Unsurprisingly, the requirements for non-statewide office are lower. An independent nominating petition for a Congressional petition requires 3,500 valid signatures and a valid independent nomination petition for State Senate requires 3,000. *See* Election Law § 6-142.

STANDARD OF REVIEW

Two provisions of New York State Civil Practice Law and Rules ("CPLR") govern intervention by third parties in a pending action or proceeding. First, CPLR § 1012(a)(2) permits intervention as of right: "[u]pon timely motion, any person shall be permitted to intervene in any action . . . when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." Second, CPLR § 1013 allows intervention in the discretion of the court:

> Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

By their terms, "[i]ntervention pursuant to either CPLR 1012 or 1013 requires a timely motion." *Rutherford Chemicals, LLC v. Assessor of Town of Woodbury*, 115 A.D.3d 960, 961 (2d Dept 2014). Furthermore, the same generally applicable defenses, including lack of standing, apply to intervenor claims. *See generally Kobrick v. New York State Div. of Hous. & Cmty. Renewal*, 126 A.D.3d 538, 540 (1st Dept 2015) ("Supreme Court properly found that the proposed intervenor lacked standing to intervene in this proceeding.").

ARGUMENT

A. The proposed intervenors cannot satisfy the elements for mandatory or discretionary intervention.

Preliminarily, this motion is untimely, since it raises concerns that were readily ascertainable upon Petitioners' filing of the original petition. "Consideration of any motion to intervene begins with the question of whether the motion is timely." *In re HSBC Bank U.S.A.*, 135 A.D.3d 534, 534 (1st Dept 2016). "[I]ntervention . . . will not be allowed merely to permit the intervenor to accomplish now what it could have done as of right but . . . omitted to do earlier." *Darlington v. City of Ithaca,*

Bd. of Zoning Appeals, 202 A.D.2d 831, 834 (3d Dept. 1994), quoting Siegel, N.Y. Prac. § 183, at 276 (2d ed.).

As relates to the instant motion, the remedy sought in this case is and always has included a remedial Congressional map. Since its commencement, then, it was apparent that this proceeding could disrupt the 2022 electoral calendar, necessitate a modification of that calendar to accommodate any remedial maps that this Court would order, and possibly truncate the time period in which candidates, including independent candidates, could file petitions to obtain ballot access. However, the proposed intervenors make no serious attempt to justify their late filing. Although the particular date by which remedial maps could be achieved was not immediately known, such specificity was not required to foresee that candidates' interests were implicated, as evidenced by the existing respondents' raising of concerns about inadequate time and ongoing petitioning throughout these proceedings. Any purported reliance upon this Court's May 11, 2022 order is unavailing, *see* NYSCEF No. 529 at p. 6; even if the potential intervenors' prior three-month delay could be overlooked, this Court's May 5, 2022 Advisory Opinion clearly set out the terms for independent candidates to appear on the ballot, yet they waited another six days. *See* NYSCEF No. 520 at p. 5, citing *Matter of Fink v. Salerno*, 105 A.D.2d 489 (3d Dept 1984) (affirming denial of intervention due to expedited process for election matters where proceeding commenced October 3rd, Court set a return date of October 9th, and putative intervenor sought intervention on October 8th).

Relatedly, to the extent they relate to this ongoing proceeding, the potential intervenors' concerns have already been adequately represented by the existing parties. Previously in this litigation, Executive Respondents strenuously objected to moving Congressional and Senate races due to the timing, logistics, and impact on election administration. *See* NYSCEF 82 at p. 25-26. Executive Respondents continue to have a strong interest in ensuring that the rights of all candidates

to appear on the ballot are respected, and believe that the schedule proposed by the State Board of Elections and adopted by this Court guarantees those rights. As alleged candidates impacted by the invalidation of the enacted maps, the proposed intervenors cannot explain how their interests sufficiently diverge from the concerns already expressed and balanced by this Court.

Meanwhile, insofar as the proposed intervenors complain about portions of the Election Law not already raised by the existing parties, they seek to drag this Court far astray from the redistricting issues at the heart of this case. Even discretionary intervention is limited to intervenors who raise claims or defenses involving "common question of law or fact." *See* CPLR 1013. Because this Court's orders have not reduced or otherwise impacted the petitioning period for independent nominating petitions, it should deny intervention.

B. The proposed intervenors have not demonstrated a sufficiently "severe burden" on their free speech to justify intervention.

The proposed intervenors premise their need to intervene upon the claim that "[e]nforcement of [the Election Law] provisions without modification would, as applied, severely burden Free Speech under the First Amendment to the US Constitution and New York State Constitution, Art. 1, § 8." NYSCEF No. 529 at p. 3. However, multiple courts have already upheld the Election Law requirements at issue, even during the height of the COVID-19 pandemic, during which time only slight modifications to standard Election Law requirements were made due to the quarantine orders then in place, in stark contrast with the lack of such restrictions in place today.[3]

"The U.S. Constitution grants States 'broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by

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[3] Today's continuing pandemic response is limited to testing and indoor masking requirements that in no way hinder the petitioning process. And because there has been no reduction in the six-week petitioning period, there is no basis for reducing the signature requirement. *See* Election Law § 138 (4).

state control over the election process for state offices.'" *SAM Party of New York v. Kosinski*, 987 F.3d 267, 274 (2d Cir. 2021), quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). To ensure effective democratic electoral processes, "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Id.* Instead of strict scrutiny, therefore, voting regulations like those challenged by the proposed intervenors are analyzed under the *Anderson-Burdick* framework.

As the Second Circuit recently reiterated:

> "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." [*Burdick v. Takushi*, 504 U.S. 428, 434 (1992)]. First, if the restrictions on those rights are "severe," then strict scrutiny applies. *Id*. "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id*. (quoting *Anderson*, 460 U.S. at 788).
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> This latter, lesser scrutiny is not "pure rational basis review." *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108 (2d Cir. 2008). Rather, "the court must actually 'weigh' the burdens imposed on the plaintiff against 'the precise interests put forward by the State,' and the court must take 'into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.' " *Id*. at 108–09 (quoting *Burdick*, 504 U.S. at 434). Review under this balancing test is "quite deferential," and no "elaborate, empirical verification" is required. *Id*. at 109 (quoting *Timmons*, 520 U.S. at 364).

SAM Party of New York, 987 F.3d at 274.

In applying this sliding scale test, the severity of the restrictions imposed determines the level of judicial review. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (internal quotations omitted); *see also Price v. New York State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (the State's reasonable and nondiscriminatory restrictions will generally be sufficient

to uphold the statute if they serve important state interests, and judicial review in such circumstances will be quite deferential). Notably, "[c]andidacy is not a fundamental right in our political system, and not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Fulani v. McAuliffe*, 2005 WL 2276881, at *3 (S.D.N.Y. Sept. 19, 2005), *citing Anderson*, 460 U.S. at 788, and *Clements v. Fashing*, 457 U.S. 957, 963 (1982).

The Election Law requirements at issue here have previously been upheld, and the proposed intervenors cannot demonstrate a sufficiently "severe burden" upon their First Amendment rights to warrant intervention at the risk of extending these proceedings. The Southern District of New York recently found New York's requirement that "independent nominating petitions for statewide office must be signed by the lesser of 45,000 registered voters or 1% of the votes cast in the last gubernatorial election (nominating petitions for non-statewide office require fewer signatures)," to be "in line with other states' requirements," and in fact, *less strict* than seventeen other states when compared by population of eligible signatories. *SAM Party of New York v. Kosinski*, No. 20-CV-323 (JGK), 2021 WL 6061301, at *8 (S.D.N.Y. Dec. 22, 2021).

Even during the height of the COVID-19 pandemic response, in the midst of strict social distancing and quarantine orders, courts found the timing and signature requirements to be "not severe, but reasonable and nondiscriminatory," and deferred to the State's strong interest, as articulated by the State Board of Elections, "in assuring that there is a modicum of public support for independent candidacy, and substantial regulation of elections if they are to be fair, honest, and orderly." *See* Declaration of Heather L. McKay, Exhibit 1 at p. 25-26 (denying TRO request by plaintiff-candidates Joshua Eisen and Gary Greenburg despite COVID quarantine orders); *see also Eisen v. Cuomo*, No. 54542/2020, 2020 WL 7978403, at *2 (N.Y. Sup. Ct. Oct. 29, 2020) ("The

United States Supreme Court has recognized that a state has a legitimate interest in limiting the names printed on a ballot to candidates who have demonstrated some degree of support. *See Kuntz v. New York State Senate*, 113 F.3d 326, 327 (2d Cir. 1997); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Candidates who have won their party's primary have already demonstrated a substantial level of support, unlike independent candidates. *Kuntz*, 113 F.3d at 328.").

Particularly because their petitioning process has remained undisturbed, the proposed intervenors have not demonstrated that either (a) the 45,000 signatures required for independent candidates to appear on the general ballot for statewide office; (b) the requirement to obtain sufficient signatures from half the congressional districts; or (c) the modified political calendar adopted by this Court at the request of the State Board of Elections will severely burden their First and Fourteenth Amendment rights. Other than citing *Lerman v. N.Y.C. Bd. of Elections*, 232 F.3d 135 (2d Cir. 2000) for the proposition that the petitioning process constitutes "core political speech," the proposed intervenors offer no analysis (let alone evidence) to support their conclusory claim that their interests are "severely burdened" in this case. *See* NYSCEF No. 529 at p. 3-4. Proposed intervenors thus conflate the steps required under the *Anderson-Burdick* framework. Regardless of the nature of the speech involved, the first question under that framework is the extent to which that right has been burdened, and "[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot," which has not been demonstrated here. *Libertarian Party v. Lamont*, 977 F.3d 173 (2d Cir. 2020), quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). Proposed intervenors have not shown absent their proposed changes, they will be excluded or virtually excluded from the ballot.

Furthermore, *Lerman* involved a challenge to a substantive restriction on petitioning—i.e., that witnesses to the signing of designating petitions be residents of the political subdivision in which

the office or position is to be voted for—whereas proposed intervenors here take issue with the overall signature and timing requirements, which are clearly "reasonable, nondiscriminatory restrictions." *See SAM Party of New York*, 987 F.3d at 274. "What is ultimately important is not the absolute or relative number of signatures required but whether a 'reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot.' " *Libertarian Party*, 977 F.3d at 177-78, quoting *Stone v. Bd. of Election Comm'rs*, 750 F.3d 678, 682 (7th Cir. 2014).

Under the circumstances here and in light of the above precedent, Executive Respondents agree with and defer to the expert judgment of SBOE that the proposed intervenors have not shown a sufficient burden on their First and Fourteenth Amendment rights from application of the standard signature requirement and the modified political calendar adopted by this Court, so as to outweigh the State's substantial interest in limiting ballot access to those who have demonstrated public support and in maintaining reasonable election deadlines. *See* NYSCEF Nos. 617 & 618. Accordingly, even on the merits, the proposed intervenors cannot demonstrate that intervention is warranted.

CONCLUSION

For the reasons set forth above, Executive Respondents respectfully request that the motion to intervene (Motion # 14) be denied in its entirety.

Dated: May 18, 2022

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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 2,825 words.

May 18, 2022
Rochester, NY

/s/ ***Heather L. McKay***
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